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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

UNITED STATES OF AMERICA,

Case No. 3:16-cr-00436-SI

Plaintiff,

v.

JOHNNY ELLERY SMITH

Defendant.

**PETITIONER’S MOTION TO VACATE, SET
ASIDE, OR CORRECT CONVICTION AND
SENTENCE PURSUANT TO 28 U.S.C.
§ 2255 OR IN THE ALTERNATIVE TO
DISMISS THE PENDING SUPERVISED
RELEASE VIOLATION AND TERMINATE
MR. SMITH’S SUPERVISION**

ORAL ARGUMENT REQUESTED

Petitioner Johnny Smith, through his attorney, respectfully submits this motion to vacate, set aside, or correct his conviction and sentence pursuant to 28 U.S.C. § 2255 for the Court’s consideration. In the alternative, Mr. Smith moves to dismiss his pending supervised release violation and terminate his supervision.

I. Procedural History And Summary Of Argument

In November 2016, Johnny Smith was indicted for two counts of Attempt to Elude a Police Officer in violation of Or. Rev. Stat. § 811.540(1). ECF No. 1. Mr. Smith is an enrolled member of the Confederated Tribes of Warm Springs, and the two incidents described in the indictment occurred within the tribal boundaries of the Warm Springs reservation. The government asserted jurisdiction to charge a tribal member with a state law violation in federal court through the Assimilative Crimes Act (18 U.S.C. § 13) and the Indian Country Crimes Act (18 U.S.C. § 1152).

On May 23, 2017, Mr. Smith filed a motion to dismiss the indictment for lack of jurisdiction, arguing that the Assimilative Crimes Act and the Indian Country Crimes Act do not provide federal jurisdiction over state law crimes that are not major crimes as defined by the Major Crimes Act (18 U.S.C. § 1153). ECF No. 12. On August 15, 2017, Judge Brown issued an opinion denying Mr. Smith's motion. ECF No. 21.

On December 5, 2017, after being sentenced to 19 months and one day in prison, Mr. Smith filed a Notice of Appeal. ECF No. 37. On May 28, 2019, after briefing and argument by the parties, a three-judge panel for the Ninth Circuit affirmed the district court and held that the prosecution of Mr. Smith was not an unlawful intrusion into tribal sovereignty. *United States v. Smith*, 925 F.3d 410 (9th

Cir. 2019). On October 15, 2019, the Supreme Court denied *certiorari*. *Smith v. United States*, 140 S.Ct. 407 (2019).

On July 9, 2020, the Supreme Court issued its opinion in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In holding that much of Oklahoma is tribal land, the *McGirt* Court focused heavily on the language of federal tribal statutes, reorienting the focus of Indian Law jurisprudence on the text of tribal treaties and stating that “[i]f Congress wishes to break the promise of a reservation, it must say so.” *Id.* at 2462.

In *Miller v. Gammie*, 353 F.3d 889, 893 (9th Cir. 2003) (en banc), the Ninth Circuit announced that when prior circuit court reasoning is “clearly irreconcilable with the reasoning or theory of intervening higher authority,” the prior decision should be rejected “as having been effectively overruled.” The Ninth Circuit’s decision in *Smith* affirming the district court in this case is irreconcilable with the reasoning of *McGirt* in two ways.

First, the *Smith* court’s conclusion that the Warm Springs reservation qualifies as “[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof” under 18 U.S.C. § 7(3) (the statute defining where the Assimilative Crimes Act applies) is irreconcilable with *McGirt* command the courts strictly honor tribal treaties. The Treaty of 1855 created the Warm Springs reservation, “[a]ll of which shall be set apart, and, so far as necessary, surveyed and marked out for *their exclusive use*[.]” Treaty of 1855, Art. 1, para 5,

12 Stat. 963. Because Congress has not revoked the treaty as required by *McGirt*, the exclusive use provision of the Treaty of 1855 remains in effect and, contrary to the *Smith* court’s opinion, 18 U.S.C. § 7(3) does not apply to the Warm Springs reservation.

Second, the *Smith* court’s holding that the Indian Country Crimes Act applies to the Warm Springs reservation is also irreconcilable with *McGirt*. Specifically, the Indian Country Crimes Act states that the general laws of the United States apply to Indian country except “to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.” 18 U.S.C. § 1152. Because the Treaty of 1855 reserves the Warm Spring reservation exclusively for tribal use, because subsequent Congressional actions have *expanded* Warm Springs tribal sovereignty over non-major criminal cases, and because Congress has not revoked the treaty, the *Smith* court’s decision regarding the applicability of the Indian Country Crimes Act to the Warm Springs reservation is irreconcilable with *McGirt*.

II. Law And Argument

a. The Ninth Circuit Opinion In *United States v. Smith*

In order for the Assimilative Crimes Act to apply state law definitions of crimes to Native American defendants, state law must go through two levels of

incorporation. First, state criminal law must be assimilated into federal enclave law via the Assimilative Crimes Act:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 13.

The “places” to which the Assimilative Crimes Act applies to are listed in 18 U.S.C. § 7. Section 7(3) states that the Assimilative Crimes Act applies to “[a]ny lands reserved or *acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof.*” 18 U.S.C. § 7(3) (emphasis added).

Next, federal enclave law must be applied to Indian Country through the Indian Country Crimes Act:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. § 1152.

In *Smith*, Mr. Smith first argued that the Warm Springs reservation was not “lands reserved or acquired for the use of the United States.” 935 F.3d at 416. The court rejected Mr. Smith’s argument, finding that Indian County—and specifically the Warm Springs reservation—was reserved or acquired for use by the United States. *Id.*

Mr. Smith next argued that the Indian Country Crimes Act did not incorporate the Assimilative Crimes Act because the phrase “general laws of the United States” was not explicit enough to warrant federal intrusion into tribal sovereignty by applying the Assimilative Crimes Act to Indian country. The court disagreed and found the phrase “general laws” in the Indian Country Crimes Act included the Assimilative Crimes Act. *Id.* at 418.

Finally, the *Smith* court concluded that none of the exceptions to federal jurisdiction contained within the Indian Country Crimes Act—including the exception for cases “where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively”—exempted application of the Indian Country Crimes Act and Assimilative Crimes Act to the

Warm Springs reservation. *Id.* at 420. This conclusion was reached in a single sentence, without any legal reasoning or any citations to legal authority. *Id.*¹

b. The Supreme Court Decision In *McGirt v. Oklahoma* Refocused Indian Law Jurisprudence On Treaty Language And Forbids Congress From Breaking Promises Made In Treaties Without Explicitly Saying So.

The Supreme Court’s opinion in *McGirt v. Oklahoma* refocuses federal Indian law jurisprudence on the fundamental tenets of inherent tribal sovereignty. The ruling insists that, absent explicit Congressional revocation of a treaty’s promises, tribal treaty language must be honored.

The issue in *McGirt* was whether the Creek Indian Nation in Oklahoma remained a reservation for federal criminal jurisdiction purposes. *McGirt*, 140 S.Ct. at 2459. The Court ruled that the Creek Indian Nation was a reservation for criminal jurisdiction purposes, writing: “Today we are asked whether the land these treaties promises remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.” *Id.*

To establish the continued existence of the Creek reservation, the Court relied on the language contained in the original treaties made between the tribe and the federal government. *Id.* at 2461. The Court ruled that, because of the deference

¹ Stating without analysis: “Here, these limitations did not prohibit the federal government’s prosecution of Smith.”

afforded to tribal sovereignty, it would not “lightly infer” a “breach” of a promise made by treaty. *Id.* at 2462. Rather, where Congress wishes to break a promise made in a treaty “it must say so.” *Id.* Despite the “many” ways Congress had “intruded on the Creek’s promised right to self-governance” (including a 1901 allotment agreement that announced that the Creek tribal government “shall not continue”) the Court was unwilling to allow Congress to break promises made in a treaty without explicitly saying so. *Id.* at 2465.

Prior to *McGirt*, the controlling case law surrounding breaking treaty promises through reservation diminishment and disestablishment followed the test set out in *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Under *Solem*, courts engaged in a three part inquiry requiring “[the Court] to examine laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third.” *McGirt*, 140 S. Ct. at 2468. However, in *McGirt*, instead of applying the latter two parts of the inquiry, Justice Gorsuch determined that the only “step” of the inquiry “proper for a court of law” involves “ascertain[ing] and follow[ing] the original meaning of the law before [the Court].” *Id.* (citing *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019) (slip op., at 6)).

Just after the publication of the opinion in *McGirt*, the Seventh Circuit had an opportunity to address its impact on Indian law jurisprudence in *Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020). Tracking Justice Gorsuch’s

approach in *McGirt*, the court read “*McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation.” *Id.* at 668. Adding on, the court clarified that under *McGirt*, “extratextual sources” cannot be used to manufacture ambiguity where none existed on the face of the statutory text. *Id.* at 685. *Oneida Nation* also held that *McGirt* upset its prior circuit authority on this issue, finding its prior reasoning “in tension” with the adjustments made by Justice Gorsuch, showcasing how *McGirt* represents a reorientation of Indian law jurisprudence around holding the government to promises to Indian tribes absent express Congressional revocation of the promises. *Id.* at 682, n. 13.

c. The Warm Spring Reservation History And Treaties

Located near Mt. Hood National Forest, the Warm Springs Reservation is home to the Confederated Tribes of Warm Springs, a consolidated group of three different groups of Native Americans: the Wasco tribe, the Warm Springs tribe, and the Paiute tribe. CONFEDERATED TRIBES OF WARM SPRINGS, <https://warmsprings-nsn.gov/> (last visited Nov. 10, 2020). The Warm Springs reservation was created by the Treaty of 1855. The treaty created a reservation, “[a]ll of which shall be set apart, and, so far as necessary, surveyed and marked out for *their exclusive use*; nor shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent.” Art. 1, para. 5, 12 Stat. 963 (emphasis

added). Additionally, Article 5, paragraph 4 of the Treaty reads: “Provided, however, That no State legislature shall remove the restrictions herein provided for without the consent of Congress.”

In 1865, the United States negotiated a Supplemental Treaty with the Warm Springs tribes, 14 Stat. 751, where the tribe expressly relinquished its off-reservation subsistence rights. However, in 2019 and 2020 Congress and the House of Representatives voted to pass the 1865 Treaty Nullification Act. On October 20, 2020, President Trump signed the bill (known as S. 832) into law, calling the 1865 treaty “unenforced” and “unfair.” President Donald J. Trump, Statement by the President (Oct. 20, 2020) (transcript available at https://www.whitehouse.gov/briefings-statements/statement-by-the-president-102020/?fbclid=IwAR3sl0mKz4XDxsZyVCOkLwunmCoufJhMcL4gpvqlOEsQQvobV4sZkk_JA9M).

The passage of the 1865 Treaty Nullification Act is both an example of how Congress can explicitly nullify a treaty, and a reinforcement that the Treaty of 1855, with its promise of a reservation set aside for the “exclusive” use of Warm Springs tribal members, remains a promise Congress intends to keep.

In *U.S. Dep’t of Labor v. Occupational Safety & Health Review Comm’n*, 935 F.2d 182, 184 (9th Cir. 1991), the Ninth Circuit interpreted the exclusive use provision of the Treaty of 1855 in the context of an attempt by the Occupational

Safety & Health Review Commission to exempt a tribal sawmill from Occupational Safety and Health Act (“OSHA”) regulations. The court concluded that limited entry of OSHA inspectors onto the reservation did not violate the exclusive use provision of the Treaty of 1855 because the mill employed a significant number of non-tribal members and sold virtually all of its product to non-tribal members through the channels of interstate commerce. *Id.* at 184. Therefore, there was no intrusion into tribal governance issues. *Id.*

By contrast, tribal criminal jurisdiction over tribal members has long been recognized as integral to tribal sovereignty and self-governance. Federally recognized tribes continue to retain those aspects of sovereignty that are “needed to control their own relations, and to preserve their own unique customs and social order.” *Duro v. Raina*, 495 U.S. 676, 685-686 (1990). “The power of a tribe to prescribe and enforce rules of conduct for its own members does not fall within that part of sovereignty which the Indian implicitly lost by virtue of their dependent status.” *Id.* at 686 (citations and internal quotation marks omitted).

d. Pursuant to *Miller v. Gammie*, Where Prior A Prior Case Is Irreconcilable With The Reasoning Of A Higher Intervening Authority, The Prior Case Is Effectively Overruled.

In *Miller v. Gammie*, 353 F.3d 889, 899-900 (9th Cir. 2003) (en banc), the Ninth Circuit held that a district court or a three-judge panel, is free to reexamine the holding of a prior circuit decision when the decision of a higher court on a “closely

related, but not identical issue” “undercut[s] the theory or reasoning of underling the prior circuit precedent[.]” The focus of the inquiry under *Gammie* is whether the prior authority’s reasoning and theory is inconsistent with the intervening authority. *Id.* at 900. Because the focus is on the consistency of reasoning or theory rather than the specific facts, the “issues decided by the higher court need not be identical in order to be controlling.” *Id.* In this way, lower courts are “bound not only by the holdings of higher courts' decisions but also by their ‘mode of analysis.’” *Id.* (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L.Rev. 1175, 1177 (1989)).

Miller v. Gammie has been consistently reaffirmed by the Ninth Circuit when a court’s prior decision was inconsistent in analysis and therefore functionally irreconcilable with intervening authority. *See, e.g., U.S. v. Lindsey*, 634 F.3d 541, 549 (9th Cir. 2011) (refusing to apply inconsistent precedent because the Supreme Court found that the erroneous denial of a peremptory challenge may be subject to harmless-error review and adhered to a structural error analysis that the Ninth Circuit previously declined to apply); *SEIU Local 121RN v. Los Robles Regional Medical Center*, 976 F.3d 849, 851-52 (9th Cir. 2020) (finding that the Supreme Court superseded precedent when it expressly rejected the notion that labor arbitration disputes should be analyzed differently than commercial arbitration disputes).

Miller v. Gammie applies to both inconsistent reasoning and opposite holdings that use otherwise reasonable methods of interpretation. *Fireman's Fund Ins. Co. v. Oregon Auto. Ins. Co.*, 2010 WL 3467297 *8 n. 1 (D. Or. Sep. 2, 2010).

e. Broken Promises—This Court Must Vacate Mr. Smith's Convictions Based On The Intervening Authority Provided By *McGirt v. Oklahoma*

The *Smith* court's decision is irreconcilable with *McGirt's* command that courts hold Congress to its word when it makes promises in tribal treaties absent explicit Congressional intent to break the promises. Specifically, two conclusions at the heart of the *Smith* opinion are irreconcilable with *McGirt's* insistence that promises made in tribal treaties be honored.

First, the *Smith* court ruled that the Assimilative Crimes Act applied to the Warm Springs reservation because the reservation was “reserved or acquired for the use of the United States” as defined in 18 U.S.C. § 7(3). *Smith*, 925 F.3d at 416. However, in creating the Warm Springs reservation, the Treaty of 1855 set aside land, “[a]ll of which shall be set apart, and, so far as necessary, surveyed and marked out for *their exclusive use*[.]” Art. 1, para. 5, 12 Stat. 963 (emphasis added). Moreover, Article 5, paragraph four, of the Treaty states: “Provided, however, That no State legislature shall remove the restrictions herein provided for without the consent of Congress.”

Not once in the last 165 years has Congress done anything to explicitly revoke the promise of exclusive use made to the Confederated Tribes of Warm Springs in 1855. In fact, the one attempt Congress made to change the treaty in 1865 has since been invalidated as part of 1865 Treaty Nullification Act, reaffirming the federal government's commitment to the Treaty of 1855.

Put simply, the *Smith* court's conclusion that the Warm Springs reservation is land "reserved or acquired for the use of the United States" breaks the promise of exclusive use Congress made in the Treaty in 1855. Congress is free to break promises made in tribal treaties, but when they do, they must say so explicitly. *McGirt*, 124 S.Ct. at 2462. In fact, even Judge Fisher in his concurring opinion in *Smith* found the argument that the Warm Springs reservation was "reserved or acquired for the use of the United States" to be specious. *Smith*, 925 F.3d at 423 (Fisher, concurring) (stating he had "reservations" regarding the majority's opinion that an Indian reservation is "lands reserved or acquired for the use of the United States" because the finding is "inconsistent with the policy of leaving tribes free of general federal laws, except as expressly decided.").

Thus, the *Smith* court's ruling that the Assimilative Crimes Act applies to the Warm Springs reservation is irreconcilable with the Court's opinion in *McGirt*, and this Court should find that the government is not free to break promises made in the Treaty of 1855 by prosecuting Mr. Smith under the Assimilative Crimes Act.

Second, in a single sentence, and without any analysis, the *Smith* court ruled that the exception to jurisdiction contained within the Indian Country Crimes Act for “any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively” did not apply to Mr. Smith and the Warm Springs reservation. 18 U.S.C. § 1152; *Smith*, 925 F.3d at 420. Ignoring this exception breaks the promise of “exclusive use” made in the Treaty of 1855 as well.

If exclusive use means anything, it means tribes must retain the fundamental aspects of tribal sovereignty promised to them by Congress. A tribe’s ability to regulate and punish the conduct of its members is at the core of tribal sovereignty. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members . . . with the power of regulating their internal and social relations.” (citing *United States v. Kagama*, 118 U.S. 375, 381-82 (1978) (internal quotation marks omitted)).

Moreover, unlike in *McGirt*, where historical developments undercut the sovereignty of the Creek Indian Nation (though not explicitly enough to terminate its reservation status), subsequent developments on the Warm Springs reservation have strengthened tribal sovereignty. In 1934, Congress passed the Indian Reorganization Act. 48 Stat. 984 (1934). The Indian Reorganization Act empowered tribes to create their own constitutions and bylaws. *McGirt*, 140 S. Ct. at 2467. The

Confederated Tribes of Warm Spring took Congress up on its invitation and, in 1938, organized a governing body and adopted a constitution. Const. and Bylaws of the Confederated Tribes of Warm Springs Reservation of Oregon (1938). Among other things, Art. V, sec. 1(i) of the Warm Springs constitution empowered the Confederated Tribes of Warm Springs to create criminal ordinances, tribal courts, and a tribal police force for the prosecution of its tribal members. The tribe has since done just that. Thus, instead of diminishing tribal sovereignty with respect to criminal jurisdiction, Congress has since authorized the expansion of the “exclusive use” promised to the Confederated Tribes of Warm Springs in the Treaty of 1855.

As such, the *Smith* court’s determination that the exception provided for in the Indian Country Crimes Act does not apply to this case is in conflict with the Treaty of 1855 and in conflict with *McGirt’s* insistence that Congress be held to its word when it makes promises to Indian tribes.

However, there is a second reason the *Smith* court’s conclusion that the exception for jurisdiction in the Indian Country Crimes Act does not apply to Mr. Smith and the Warm Springs reservation is not binding on this Court. The *Smith* court’s conclusion was reached in a single sentence without any legal reasoning or citations to legal sources. *Smith*, 925 F.3d at 420. Cases that assume a legal principle, or announce one without analysis, carry no precedential value.

In *Nat'l Aeronautics & Space Admin.*, 562 U.S. 134 (2011), Justice Scalia discussed the role of *stare decisis* in cases where legal principles are assumed or announced without analysis. As Justice Scalia wrote, *stare decisis* reflects a policy that when the law has been decided and is “settled,” courts should continue to promote the predictable application of legal standards. *Id.* However, when a court assumes a legal principle, “there *is* no rule of law that is settled.” *Id.* (emphasis in original). “A further reason [cases which assume legal principles] are not entitled to *stare decisis* effect is” that such opinions do not “suppl[y] any coherent reason” for why a legal principle may or may not be valid. *Id.* at 164.

Thus, in addition to being irreconcilable with *McGirt*, the *Smith* court’s conclusion that this case did not fall within the exception to jurisdiction for cases in which the tribe has reserved jurisdiction by treaty stipulation is not binding because it provides no coherent legal reasoning and is not due *stare decisis* effect.

III. Conclusion

The federal prosecution of Mr. Smith for non-major state law crimes committed on the Warm Springs reservation has never been lawful. Now, with the decision in *McGirt*, the heart of the *Smith* court’s opinion—that the Assimilative Crimes Act applies to the Warm Springs reservation because it is land “reserved or acquired for the use of the United States” and that the exception to federal

jurisdiction in cases where jurisdiction has been reserved by treaty stipulation—has been invalidated.

This Court should vacate Mr. Smith’s convictions pursuant to 28 U.S.C. § 2255. In the alternative, Mr. Smith would accept as a disposition of this case the dismissal of the supervised release violation pending against him and the immediate termination of his supervised release on the grounds that his continued detention violates 18 U.S.C. § 4001(a). Section 4001(a) prohibits the incarceration of an individual except pursuant to an Act of Congress. Because Mr. Smith’s conviction was not authorized by an Act of Congress, his supervised release violation should be dismissed and he should be released with his supervision terminated.

RESPECTFULLY SUBMITTED this 10th day of November, 2020.

/s/ Conor Huseby
Conor Huseby
Attorney for Mr. Smith